United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

404

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHESTER R. NEWMAN,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

No. 21,814

APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

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I N D E X

TABLE OF CASES

UNITED STATES COURT OF APPEALS
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APPEAL FROM THE DISTRICT OF COLUMBIA
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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The issues presented for review involve the question as to at what point jeopardy attaches in a criminal case wherein trial by jury has been waived. Specifically, in a non-jury case, where all of the witnesses were sworn, but no witness testified, and no evidence was offered, was it permissible for the Government to enter a nolle prosequi and charge the appellant with a new offense based on the same conduct.

2. Secondly, in a case wherein appellant was charged with the offense of unlawful possession of a pistol under Title

22-3203, District of Columbia Code, and having elected to waive trial by jury, the witnesses were sworn, and the Government was permitted to enter a nolle prosequi and recharge the appellant with carrying a pistol without a license under Title 22-3214, District of Columbia Code, and both prosecutions were for the identical criminal conduct, were the offenses identical or the same for purposes of the Constitutional provision as to former jeopardy.

STATEMENT OF THE CASE

This is an appeal from a criminal conviction in the District of Columbia Court of General Sessions. From a conviction for violation of Title 22-3204, District of Columbia Code, (Carrying a pistol without a license). An appeal was duly noted and taken to the District of Columbia Court of Appeals, which Court affirmed the conviction by judgment andopinion on March 15, 1968. A timely motion for rehearing was made and denied by that Court and a petition for allowance of an appeal was made to this Court. Said petition was granted and appellant was allowed to prosecute this appeal by order of this Court on June 13, 1968.

Initially, appellant was charged with a violation of Title 22-3203, of the District of Columbia Code (unlawful Possession of a pistol after having been convicted of Title

22-3214 of the D.C. Code), and when appeared for trial on February 14, 1967, a jury trial was waived and appellant elected to be tried by the Court. The matter was called before the Honorable Catherine B. Kelly, of the Court at General Sessions. The witnesses, Private W. R. Manning and an employee of the Lutheran Home for the Aged, as well as the appellant were simultaneously sworn as witnesses in the case. Before any testimony was taken and before any witness took the stand, a colloquy ensued between appellant's counsel and the prosecutor concerning a stipulation of appellant's previous conviction as required by the statute. When it was apparent that appellant had not been finally convicted, the Government secured a continuance of the trial until February 17, 1967, in order to study the matter.

On February 17, 1967, counsel appeared in the chambers of Judge Kelly and it was announced that the Government was going to nolle pros the case and charge the appellant with a separate offense of Carrying a Pistol Without a License under Title 22-3204. Counsel for appellant announced that he would object to the nolle pros on the ground that jeopardy had attached and he would not consent to the new charge; that the witnesses had been sworn and this was a non-jury case. Judge Kelly referred the matter to the Assignment Court.

When the parties appeared in Assignment Court, the Government was permitted to nolle pros the information of unlawful

possession of a pistol, over objection of the appellant, and appellant was charged with the present offense.

An oral motion to dismiss the information on the ground of former jeopardy was there and then made. The Government was given an opportunity to respond, which it did in writing. Finally a formal written motion to dismiss on the ground of former jeopardy. The matter was eventually heard by the Judge presiding in Criminal Motions and denied. The motion con- considered two aspects. The first aspect concerned whether the swearing of witnesses alone in a non-jury case placed the appellant in jeopardy and assuming jeopardy did attach, did the filing of an information charging a different offense, requiring the element of lack of a license take the case out of the former jeopardy clause of the Constitution. In other words, were the two charges the same.

The Criminal Motions Judge based his ruling primarily on the ground that even though the witnesses had been sworn, no witness testified and no evidence was presented.

The case was finally called for trial before Judge Halleck, jury trial having been waived, and the motion to dismiss was renewed. The Judge denied the motion on the ground that the matter had already been passed upon by another Judge and therefore the previous denial was the law of the case.

At that point, all witnesses were again sworn, one by one and the testimony commenced.

The facts in the case were that pursuant to a complaint, Private W.R. Manning of the Metropolitan Police Department, proceeding to the Lutheran Home for the Aged, found the appell-

ant in one of the basement rooms and a search of his person revealed a loaded pistol. Appellant was a kitchen employee of the Home and changed his clothes in the basement room where he had a locker. The further evidence was that a certificate was admitted into evidence that a search of police records failed to reveal that appellant had a license to carry a pistol on the date of the offense alleged.

The Government rested its case and a motion for judgment of acquittal was made and denied by the Court. Appellant contended that the evidence showed that appellant was at his place of business and therefore fell within an exception of the statute.

The appellant was the only witness for the defense and he testified that he was employed at the Home, and was just getting,off from work when he was arrested and was at his locker in the basement changing his clothes. He testified that he kept the pistol in his locker while he was working upstairs in the kitchen. He admitted carrying the pistol as he needed it for protection.

At the conclusion of all of the evidence, a motion for judgment of acquittal was renewed and denied and the appellant was adjudged guilty.

ARGUMENT

The initial issue concerns when jeopardy attaches in a case tried by the Court without a jury. The Court recently observed that: "As a general rule, jeopardy attaches . . . when the court, sitting without a jury, begins the hearing of the evidence." United States v. Foster, 226 A.2d 164., citing

Hunter v. Wade, 169 F.2d 973, aff'd 336 U.S. 634; Clawans v. Rives, 70 U.S. App. D.C. 107, 104 F.2d 240.

District Judge Holtzoff, in an opinion, United States v. Dickerson, 168 F.Supp. 899, reversed other grounds, 106 U.S. App. D.C. 221, 271 F.2d 487, held that in a non-jury case, jeopardy attaches with the calling or swearing of the first witness.

The next question is, are the terms "begin the hearing of the evidence," and "calling or swearing of the first witness" synonymous as far as jeopardy is concerned in a non-jury case?

An examination of the authorities is in order for the answer to that question.

The Federal authorities, found by appellant, all held that in a case tried by the court, without a jury, jeopardy attaches when the court begins to hear the evidence. McCarthy v. Zerbst, 85 F.2d 640; United States v. Narvaez-Craniller, 119 F.Supp. 556; Hunter v. Wade, supra, and Clawens v. Rives, supra. United States v. Dickerson, supra, states that jeopardy attaches with the calling or swearing of the first witness.

However, none of the cited cases definitively state what is meant by the term "begin hearing the evidence." Furthermore, evidence was presented in each of the cases.

McCarthy v. Zerbst, supra. relies on Rosser v. Commonwealth, 159 Va. 1028, 167 S.E. 257, which states that in a non-jury case jeopardy attaches when the state begins to introduce its testimony, but does not elaborate on the meaning of that phrase.

Other than United States v. Dickerson, supra, the criteria

of the calling or swearing of the first witness is not used in the cases above-cited. Unfortunately, the Dickerson case, supra, cites no authorities for its proposition.

A number of state cases, however, have held that in a non-jury case, jeopardy attaches when the first witness is sworn. People v. Fritz, 295 P.2d 449; People v. Ayala, 291 P.2d 517; People v. Sturdy, 45 Cal. Repr. 203, 235 C.A.2d 306; People v. Colon, 184 N.Y.S.2d 537.

Other authority states that in a non-jury trial, jeopardy attaches at the point where the presentation of the proof begins. McCoy v. District Court 397 P.2d 733; State v. Blackwell, 198 P.2d 280, reh. den. 200 P.2d 698. This appears to be analogous to Rosser v. Commonwealth, supra.

The Court in New Mexico goes further and states that in a non-jury case, the presentation of at least some evidence is required. State v. Rhodes, 413 P.2d 214, but in the opinion of appellant the authorities cited in support thereof do not seem to lead to that conclusion.

It is obvious that some line of demarcation should be delineated so that in a non-jury case there will be a decernable point where jeopardy is established. Common sensewise, it would appear that jeopardy should attach in a non-jury case at the point where the first witness is sworn. Upon the swearing of the first witness, the Court begins to hear the evidence. It is also the point where the presentation of proof begins. This would be synomymous with jury trial cases where jeopardy attached when the jury was impaneled and sworn. The jury then becomes part of the Court - the fact finding

body. In a non-jury case, the Court is both finder of fact and judge of law. The trial, in such case, really commences when the first witness is sworn. Such being the case, jeopardy attached before Judge Kelly when the witnesses were sworn. The Government chose to terminate the prosecution over objection of the appellatn.

Appellant next contends that having established that jeopardy attached, he should not have been subject to prosecution for the present offense.

The thrust of the Government's argument below, and anticipating their argument herein, was and probably is, that the two offenses in question are not the same in that different elements are present in the former offense as opposed to the present offense. They say that in the offense of Unlawful Possession of a Pistol, the fact of the prior conviction was essential, whereas the fact of prior conviction is immaterial in a case of Carrying a Pistol Without a License - lack of license is the crucial element. Therefore, the Government says, there is no identity of offenses and hence no claim of former jeopardy.

The Government relies on the cases of Blockburger v. United States, 284 U.S. 299, and Gore v. United States, 357 U.S. 386. However, appellant submits that such an argument above misconceives the principal of former jeopardy. Appellant contends that jeopardy is not solely concerned with whether the same act violates more than one statute, but whether successive prosecutions are permitted on account of a single act.

As was stated in Green v. United States, 355 U.S. 184,

187,

> "The constitutional provision against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."

The entire concept was carefully set forth by Mr. Justice Brennan in his concurring opinion in Abbate v. United States, 359 U.S. 187, beginning at page 196.

Appellant submits that the opinion cuts through the maze of misconception and sets the standard in connection with the doctrine of former jeopardy. Appellant, recites portions of the opinion below:

> ". . .I think it is clear that successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought under federal statutes requiring different evidence and protecting different federal interests. It is true that this Court has said: 'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.' . . . But, so far as appears, neither this 'same evidence' test nor a 'separate interests' test has been sanctioned by this Court under the Fifth Amendment except in cases in which consecutive sentences were imposed on conviction of several offenses at one trial. The accused, although punished separately and cumulatively for various aspects of a single transaction, is subject to only one prosecution and one trial. If the Government attempted multiple prosecution- of the same offenses, an entirely different constitutional issue would be presented. . . .The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts. 'The underlying idea. . .is that the State with all its re-

> sources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a contionous state of anxiety and insecurity. . .' In short, 'The prohibition is not against being twice punished, but against being twice put in jeopardy. . ."

The opinion goes on to recite that a trial judge has discretion to impose consecutive sentences, but unless the Fifth Amendment applies, the prosecution would have discretion to bring successive prosecutions for the same acts.

The opinion points out that the separate federal interests can be protected by prosecution of all such offenses in a single trial and the imposition of separate sentences for each law violated.

The opinion recites In re Nielsen, 131 U.S. 176 where a conviction for polygamy, barred a subsequent prosecution for adultery under a different statute based on the same acts although proof of a different facts were required.

The opinion closes with the following language:

> "In short, though the Court in Gore has found no violence to the guarantee against double jeopardy when the same acts are made to do service for several convictions at one trial, I think not mere violence to, but virtual extinction of, the guarantee results if the Federal Government may try people over and over again for the same criminal conduct just because each trial is based on a different federal statute protecting a separate federal interest."

In the instant case, appellant has been put twice in jeopardy for the same alleged criminal conduct, namely, having in his possession a pistol. When the Government found that it could not establish an essential element of the first offense, it succeeded in terminating that prosecution, over objection, and instituted another based on the same acts. Appellant

submits that this violated the Fifth Amendment guarantee of Former Jeopardy.

CONCLUSION

Wherefore the premises considered herein, appellant prays that the judgment of the District of Columbia Court of Appeals affirming the judgment of the District of Columbia Court of General Sessions be reversed with direction that the judgment of the District of Columbia Court of General Sessions be reversed and the information upon which appellant was convicted be dismissed.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,814

CHESTER R. NEWMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District of Columbia Court of Appeals

DAVID G. BRESS,
United States Attorney.

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DCCA 4367

ISSUES PRESENTED

In the opinion of appellee, the following issues are presented:

1) In a non-jury case where the witnesses are sworn *en masse* for the court's convenience immediately after the case is called, does jeopardy attach when the witnesses are sworn *en masse* or when the Government calls its first witness and presents some testimony?

2) Was the former charge of unlawful possession of a pistol after having previously been convicted of a weapons offense (22 D.C. CODE § 3203(4)) a bar under the Double Jeopardy Clause of the Fifth Amendment to the subsequent prosecution for carrying a pistol without a license (22 D.C. CODE § 3204), where the offenses required different evidentiary proof and the person prosecuted was not prejudiced?

This case has not previously been before this Court under the same or similar title.

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked with asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,814

CHESTER R. NEWMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District of Columbia Court of Appeals

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant Newman was convicted in the District of Columbia Court of General Sessions on April 4, 1967 of carrying a pistol without a license (22 D.C. CODE § 3204 (1967)). Judge Halleck, who sitting without a jury found appellant guilty, sentenced appellant to imprisonment for six months. Appellant's conviction was affirmed on appeal. *Newman* v. *United States*, 239 A.2d 152 (D.C. Ct. App. 1968). The District of Columbia Court of Appeals rejected appellant's contention that he had been placed in jeopardy twice for the same offense. Appellant now appeals to this Court.

Appellant was charged in the District of Columbia Court of General Sessions on February 7, 1967 with unlawful possession of a pistol after having previously been convicted of a weapons offense (22 D.C. CODE § 3203(4) (1967)).[1] On February 14, 1967, the case was called for trial before Judge Kelly and appellant waived his right to jury trial. Two Government witnesses and appellant then stepped forward and were sworn as a group. Thereafter, a discussion ensued between Government counsel, appellant's counsel and the court concerning a stipulation as to appellant's previous weapons conviction. It developed that although appellant had previously pled guilty to a weapons charge, he was still waiting to be sentenced. The Government requested a continuance until February 17, 1967 in order to study the matter; the continuance was granted. No evidence had been submitted at the February 14th session nor had any witnesses been called to the stand to testify.

On February 17, 1967, the Government, over appellant's objection, entered a *nolle prosequi* to the unlawful possession of a pistol charge before Chief Judge Greene. Immediately thereafter the Government filed an information charging appellant with carrying a pistol without a li-

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[1] 22 D.C. CODE § 3203 (1967) provides:

> No person shall own or keep a pistol, or have a pistol in his possession or under his control, within the District of Columbia, if—
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> (1) he is a drug addict;
> (2) he has been convicted in the District of Columbia or elsewhere of a felony;
> (3) he has been convicted of violating section 22-2701, section 22-2722, or sections 22-3302 to 22-3306; or
> (4) he is not licensed under section 22-3210 to sell weapons, and he has been convicted of violating sections 22-3201 to 22-3216.
>
> No person shall keep a pistol for, or intentionally make a pistol available to, such a person, knowing that he has been so convicted or that he is a drug addict. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted of a violation of this section, in which case he shall be imprisoned for not more than ten years.

cense (22 D.C. CODE § 3204 (1967)).[2] Appellant moved to dismiss the carrying a pistol charge on the ground of double jeopardy. This motion was finally heard on March 31, 1967 by Judge Fickling, after Government and appellant filed written memoranda. The motion to dismiss was denied because jeopardy had not attached to the unlawful possession of a pistol charge.

On April 4, 1967, the carrying a pistol case was called for trial before Judge Halleck, who heard the case without a jury. The Government's evidence showed that on February 6, 1967, appellant, who did not have a license to carry a pistol, was arrested with a loaded pistol in his possession. Appellant took the stand and admitted carrying the pistol, claiming he needed it for protection. At the conclusion of all the evidence, appellant was found guilty as charged.

ARGUMENT

I. In a non-jury case where the witnesses are sworn *en masse* for the court's convenience immediately after the case is called, jeopardy does not attach until the Government calls its first witness and presents some testimony.

The federal law is clear that jeopardy attaches in a non-jury case when the court begins to hear evidence.[3] As

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[2] 22 D.C. CODE § 3204 (1967) provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

[3] Many states have followed the federal rule. *McCoy* v. *District Court, Denver County*, 156 Colo. 115, 397 P.2d 733 (1964); *People*

this Court stated in *Clawans* v. *Rives*, 70 U.S. App. D.C. 107, 109, 104 F.2d 240, 242 (1939), "Jeopardy attaches in a case without a jury when the accused has been subjected to a charge and the court has begun to hear evidence." *Accord*, *Hunter* v. *Wade*, 169 F.2d 973, 975 (10th Cir. 1948), *aff'd*, 336 U.S. 684 (1949); *McCarthy* v. *Zerbst*, 85 F.2d 640, 642 (10th Cir.), *cert. denied*, 299 U.S. 610 (1936); *United States* v. *Foster*, 226 A.2d 164, 166 (D.C. Ct. App. 1967).[4] In the case at bar, no witnesses were called to the stand and no evidence was presented for the court, sitting without a jury, to hear on the charge of unlawful possession of a pistol; therefore, the court could not have "begun to hear evidence" and jeopardy did not attach to the unlawful possession of a pistol charge.

Appellant contends that the swearing of the first witness is the point in the proceeding when the court begins the hearing of the evidence.[5] We disagree. Appellant's contention is contrary to the plain meaning of the rule. The court begins the hearing of evidence when the first witness is called to testify and some evidence is presented to hear.

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v. *Laws*, 29 Ill. 2d 221, 193 N.E. 2d 806 (1963); *State* v. *Blackwell*, 65 Nev. 405, 198 P.2d 280 (1948); *State* v. *Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966); *Bland* v. *Supreme Court, New York County*, 20 N.Y. 2d 552, 285 N.Y.S. 2d 597, 232 N.E. 2d 633 (1967); *Nolan* v. *Court of General Sessions, New York County*, 11 N.Y. 2d 114, 227 N.Y.S. 2d 1, 181 N.E. 2d 751 (1962); *Rosser* v. *Commonwealth*, 159 Va. 1028, 167 S.E. 257 (1933); *State* v. *Ridgley*, 70 Wash. 2d 555, 424 P.2d 632 (1967). *But see People* v. *Sturdy*, 45 Cal. Rptr. 203, 235 Cal. App. 2d 306 (Dist. Ct. App. 1965); *State* v. *Yokum*, 155 La. 846, 99 So. 621 (1923).

[4] In *United States* v. *Dickerson*, 168 F. Supp. 899, 902 (D.D.C. 1958), *rev'd*, 106 U.S. App. D.C. 221, 271 F.2d 487 (1959), Judge Holtzoff remarked that "if a trial is commenced . . . by calling or swearing the first witness at a non-jury trial, jeopardy attaches." This statement is unsupported dictum. In any event, no witnesses were *called* to testify in the instant case as Judge Holtzoff suggests may be necessary for jeopardy to attach.

[5] Brief for Appellant at 7-8.

This is especially true in non-jury cases in the District of Columbia Court of General Sessions. There, it is common in non-jury cases for all the witnesses to be sworn as a group immediately after the case is called. Quite often the witnesses are sworn before the prosecutor assigned to that particular courtroom has a chance to review the trial jacket and familiarize himself with the facts and problems of the case. It is rather automatic that all witnesses having anything to do with the case will be sworn, and quite often some of these witnesses will not be called to testify. Before the Government proceeds with calling its first witness and eliciting testimony, a number of intervening acts are likely to occur. For example, the Government will take a few minutes to review its case (including talking to witnesses to determine which ones to call) and preliminary matters will be discussed between the parties and the court. In addition, pre-trial motions are often heard at this stage, including motions to suppress seized property; should the trial judge grant a motion to suppress at this stage, the Government would have a statutory right to appeal as long as jeopardy had not attached. 23 D.C. CODE § 105(b) (As amended June 19, 1968). Thus, in non-jury cases in the District of Columbia Court of General Sessions, the swearing of witnesses does not lead immediately to the court hearing evidence, and it cannot be said that the court begins the hearing of evidence when the first witness is sworn.

There is sound reasoning behind the rule that jeopardy does not attach in a non-jury case until some evidence is presented. The presentation of some evidence in a non-jury trial represents the first substantive and irrevocable step in the trial involving an affirmative act on the part of the Government. In a jury trial, the first substantive and irrevocable step involving an affirmative act on the part of the Government is the selection and swearing of the jury. Accordingly, the rule in a jury case is that

jeopardy attaches when the jury has been impaneled and sworn.[6]

The swearing of witnesses *en masse* immediately after the case is called is not a substantive or irrevocable part of the trial, rather it is an administrative and mechanical part of the proceedings. Although witnesses are sworn, there is no requirement that they be called to testify; in fact, frequently in non-jury cases in the Court of General Sessions cumulative witnesses will not be called to testify. In addition, the swearing of witnesses *en masse* immediately after the case is called does not represent an affirmative act or judgment-making on the part of the Government. It is merely a procedure adopted for the *convenience* of the court: a time-saving device. Such a court initiated procedure should not represent the point in the proceedings when jeopardy attaches. Jeopardy does not attach in a non-jury case until the Government calls its first witness and presents some evidence.

II. The former charge of unlawful possession of a pistol after having previously been convicted of a weapons offense (22 D.C. CODE § 3203(4)) was not a bar under the Double Jeopardy Clause of the Fifth Amendment to the subsequent prosecution for carrying a pistol without a license (22 D.C. CODE § 3204) since the offenses required different evidentiary proof and the person prosecuted was not prejudiced.

The Fifth Amendment of the United States Constitution provides in part:

> (N)or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

The constitutional provision against double jeopardy "is not properly invoked to bar a second prosecution unless

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[6] *Hunter* v. *Wade*, 169 F.2d 973, 975 (10th Cir. 1948), *aff'd*, 336 U.S. 684 (1949); *McCarthy* v. *Zerbst*, 85 F.2d 640, 642 (10th Cir.), *cert. denied*, 299 U.S. 610 (1936); *United States* v. *Foster*, 226 A.2d 164, 166 (D.C. Ct. App. 1967).

the 'same offence' is involved in both the first and second trials." *United States* v. *Ewell*, 383 U.S. 116, 124 (1966). The most often quoted and relied on interpretation of the "same offence" clause was written by Judge Gray of the Supreme Judicial Court of Massachusetts in *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871):

> A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.[7]

This test has been adopted by the Supreme Court of the United States and the courts in the District of Columbia. *Gavieres* v. *United States*, 220 U.S. 338 (1911); *District of Columbia* v. *Buckley*, 75 U.S. App. D.C. 301, 128 F.2d 17, *cert. denied*, 317 U.S. 658 (1942); *Sims* v. *Rives*, 66 App. D.C. 24, 84 F.2d 871, *cert. denied*, 298 U.S. 682 (1936); *Randolph* v. *District of Columbia*, 156 A.2d 686 (D.C. Mun. Ct. App. 1959).[8] All four of these cases upheld successive prosecutions for different criminal offenses although arising out of the same act. Succinctly stated a

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[7] This Court in *Sims* v. *Rives*, 66 App. D.C. 24, 29, 84 F.2d 871, 876, *cert. denied*, 298 U.S. 682 (1936), quoting from *Morgan* v. *Devine*, 237 U.S. 632 (1915), stated the rule as follows:

> (T)he test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes.

[8] *Accord*, *United States* v. *Jones*, 334 F.2d 809 (7th Cir. 1964), *cert. denied*, 379 U.S. 993 (1965); *United States* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961); *Bacon* v. *Sullivan*, 200 F.2d 70 (5th Cir. 1952), *cert. denied*, 345 U.S. 910 (1953).

subsequent prosecution is not for the "same offence" as a former prosecution if each prosecution requires proof of an additional fact that the other does not. *Harris* v. *United States*, No. 21,462, D.C. Cir., September 11, 1968.[9]

Applying the above-stated test to the instant case, it is clear because of technical differences that a prosecution for unlawful possession of a pistol after having previously been convicted of a weapons offense and a prosecution for carrying a pistol without a license are not prosecutions for the "same offence" under the Fifth Amendment. A conviction for unlawful possession of a pistol requires proof of possession of a pistol and proof of a former weapons conviction, whereas a conviction for carrying a pistol without a license requires proof of carrying a pistol at some place other than the person's dwelling house or place

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[9] Appellant relies on Justice Brennan's concurrence in *Abbate* v. *United States*, 359 U.S. 187, 196-201 (1959) as support for his position. Brief for Appellant at 9-10. However, the majority in *Abbate* failed to adopt Justice Brennan's analysis. Furthermore, at no time has the Supreme Court restricted its holding in *Gavieres* v. *United States*, 220 U.S. 338 (1911). In fact, only recently this Court cited *Gavieres* with approval. *Harris* v. *United States*, No. 21,462, D.C. Cir., September 11, 1968. *Gavieres* remains the law. *United States* v. *Jones*, 334 F.2d 809, 812 (7th Cir. 1964), *cert. denied*, 379 U.S. 993 (1965).

Appellant also cites the case of *In re Nielsen*, 131 U.S. 176 (1889) as authority for his position that the Government cannot bring successive prosecutions based on the same act although involving different offenses and requiring different proof. Brief for Appellant at 10. Actually, *In re Nielsen* supports appellee. In that case, the Supreme Court cited *Morey* v. *Commonwealth*, 108 Mass. 433 (1871) with approval and then found that the two prosecutions brought against defendant Nielsen could be proved by the same evidence.

Likewise, *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959) does not support appellant's position. In *Sabella*, the Second Circuit held that the Government, after prosecuting Sabella for sale of heroin without a written order (26 U.S.C. § 4705), could not prosecute him for selling illegally imported heroin (21 U.S.C. §§ 173, 174) since "the government could sustain the second indictment [21 U.S.C. §§ 173, 174] with the self-same evidence needed to prove the first [26 U.S.C. § 4705]." *Id.* at 210. The Second Circuit applied the same evidence test. In the instant case, the evidence needed to prove the charge of unlawful possession of a pistol after having previously been convicted of a weapons offense would not be sufficient to prove the charge of carrying a pistol without a license and vice versa.

of business and proof that the person was not licensed to carry a pistol. Since the evidence required to prove unlawful possession of a pistol would not prove carrying a pistol without a license and vice versa, the offenses cannot be considered the "same offence" under the Double Jeopardy Clause of the Fifth Amendment.[10]

In the final analysis, however, it is clear that appellant has not been prejudiced by what has transpired in the instant case. Appellant was arrested for having a loaded pistol on his person and after a fair trial he was convicted of this wrongful act. "The crime of carrying, without a license, a pistol or other deadly or dangerous weapon capable of being concealed is a serious matter in a troubled metropolitan area." *Epperson* v. *United States*, 125 U.S. App. D.C. 303, 305, 371 F.2d 956, 958 (1967). The only complaint here by appellant is that he was charged the day after his arrest with unlawful possession of a pistol after having previously been convicted of a weapons offense, and that ten days later this charge was nolle prossed and a new charge of carrying a pistol without a license was instituted. The explanation for this action is simple. At the time appellant was charged with unlawful possession of a pistol after having previously been convicted of a weapons offense, the Government was unaware that appellant's prior weapons conviction had not been finalized by sentence. Apparently, the pending status of appellant's prior weapons conviction was not noted on

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[10] Of course, if the Government prosecutes a person for unlawful possession of a pistol and his defense is that he did not have the pistol and he is acquitted, the Government would be barred from prosecuting that person for carrying a pistol without a license in a subsequent trial on the ground of *res judicata;* that is, an element in the first prosecution that would be an essential element in the second prosecution had been adjudicated against the Government and cannot be relitigated. See *Sealfon* v. *United States*, 332 U.S. 575 (1948); *United States* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961); *Hearn* v. *District of Columbia*, 178 A.2d 434 (D.C. Mun. Ct. App. 1962). The present case before this Court, of course, is not a case where the Government lost at the first trial and sought a different and more favorable trier of fact at a second trial. Here, no facts were heard or adjudicated by the court on the charge of unlawful possession of a pistol.

appellant's police record which would have been reviewed by the Assistant United States Attorney who initially charged appellant. When this technical deficiency was discovered and verified ten days later, the Government nolle prossed the unlawful possession of a pistol charge and instituted the charge of carrying a pistol without a license.

In *Epperson* v. *United States*, 125 U.S. App. D.C. 303, 371 F.2d 956 (1967), this Court found "nothing objectionable" with this type of Government conduct. In the *Epperson* case, the Government had charged Epperson with the misdemeanor of carrying a pistol without a license. Two months later the Government discovered that appellant had a prior felony conviction. Accordingly, the Government nolle prossed the misdemeanor charge of carrying a pistol without a license and instituted the felony charge of carrying a pistol without a license. In upholding this conduct, this Court explained, "The courts will not skimp in affording the prosecutor an opportunity to obtain and appraise the prior record of the accused . . . ." *Id.* at 305, 371 F.2d 958. What transpired in the case at bar is no different than what occurred in *Epperson*. Clearly, in the instant case the Government's actions were not abusive and no injustice has been done to this appellant.[11]

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[11] The well-known reluctance on the part of the United States to indulge in successive prosecutions (see *Petite* v. *United States*, 361 U.S. 529 (1960) and *Marakar* v. *United States*, 370 U.S. 723 (1962)) is not involved in the instant case, where a technical deficiency regarding a prior weapons conviction was understandably not brought to light the day after appellant's arrest. See *Epperson* v. *United States*, 125 U.S. App. D.C. 303, 371 F.2d 956 (1967).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District of Columbia Court of Appeals should be affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,814

CHESTER R. NEWMAN,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

PETITION FOR REHEARING
SUGGESTION FOR REHEARING EN BANC

Pursuant to the provisions of Rule 35(c) and Rules 40 of the Federal Rules of Appellate Procedure, appellant petitions the Court for a rehearing with a suggestion for rehearing en banc as the case involves a Constitutional issue. The basis for the petition is as follows:

1. A panel of this Court affirmed a decision of the District of Columbia Court of Appeals by judgment and opinion filed March 10, 1969. The petition is therefore timely.

2. The facts are simple and undisputed. Appellant was convicted of carrying a pistol without a license (Title 22-3204, D.C. Code. A former prosecution based upon the same transaction for unlawful possession of a pistol after a previous weapons offense (Title 22-3203) was terminated by the Government by the entry of a "nolle prosequi" over objection by appellant after the witnesses had been sworn, but before any testimony had been

adduced. Trial by jury had been waived.

3. The District of Columbia Court of Appeals, in its opinion filed March 15, 1968 felt that it was unnecessary to decide whether jeopardy attached with the swearing of witnesses in a non-jury trial as there was a lack of identity of offenses.

4. The panel of this Court affirmed the judgment of the District of Columbia Court of Appeals on the ground that jeopardy did not attach in the first proceeding and did not need to consider the second ground, identity of offenses.

5. The general rule laid down in cases of jeopardy in a non-jury trial is that jeopardy attaches ". . .when the accused has been subjected to a charge and the court has begun to hear evidence." Clawans v. Rives, 104 F.2d 240, also Hunter v. Wade, 169 F.2d 973, aff'd other grounds, 336 U.S. 684.

6. This case of first impression in this Court involved consideration of when the court begins to hear the evidence. The panel of the Court concluded by agreeing with the Government's analysis that the swearing of witnesses in a non-jury case, is but an administrative procedure followed for the convenience of the Court.

7. The only other case in this jurisdiction which affirmatively states that jeopardy attaches in a non-jury case by "calling or swearing the first witness," is United States v. Dickerson, 168 F.Supp. 899, rev'd other grounds 106 U.S. App. D.C. 221, 271 F.2d 487. No authorities appear in the Dickerson case supporting that statement.

8. The authorities in other jurisdictions are not in harmony or do not definitively state what is meant by "begin hearing the evidence." i.e. McCarthy v. Zerbst, 85 F.2d 640; United States v. Narvaez-Graniller, 119 F.Supp 556. Rosser v. Commonwealth, 159 Va. 1028, 167 S.E. 257 relied on by McCarthy v. Zerbst, supra, asserts that jeopardy attaches in a non jury case when the state begins to introduce its testimony. The meaning is not elaborated. McCoy v. District Court, 397 P.2d 733 and State v. Blackwell, 198 P.2d 280, reh. den. 200 P.2d 698, use the term, "the point where the presentation of the proof begins." Still no definition. The Supreme Court of New Mexico in State v. Rhodes, 413 P.2d 214, requires the presentation of at least some evidence.

9. In the cases of People v. Fritz, 295 P.2d 449, People v. Ayala, 291 P.2d 517, People v. Sturdy, 45 Cal. Repr. 203 235 C.A.2d 306; and People v. Colon, 184 N.Y.S.2d 537 hold that jeopardy attaches in a non-jury case when the first witness is sworn.

10. Appellant contends that the authorities cited in paragraph 9, above lead to a rule that avoids the least confusion. They establish a line of demarcation about which there can be no dispute - the swearing of the first witness. Appellant can conceive of much dispute over the general term "begins hearing the evidence." Just what constitutes evidence? Suppose a witness should merely give his name and address - would such constitute hearing evidence?

11. The Fifth Amendment of the Constitution asserts that

a person shall not be twice placed in jeopardy. In a jury case it has been determined that jeopardy attaches with the swearing of the impaneled jury. The trial has commenced. In a non-jury case, it would appear logical and in accord with the mandate of the Fifth Amendment that the swearing of the witnesses commences the trial. The jury constitutes the fact-finding arm of the Court. In a non-jury case, the judge is both the fact finder and the ruler of law. There must be a line of demarcation somewhere. The swearing of the witnesses in a non-jury case seems to appellant to be the appropriate line.

12. In view of the fact that this a case of first impression in this Court and of the Constitutional issue involved, appellant requests a rehearing with a suggestion for rehearing en banc.

WHEREFORE, appellant prays that this petition be granted.

Respectfully submitted,

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